Supreme Court, U.S.
FILED
AUG 6 - 2010
OFFICE OF THE CLERK

10-192

CASE NO.

# In the Supreme Court of the United States

MICHELLE ROSS,
Petitioner,

v.

PFIZER, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Bradley W. Eskins (19372)

50 North Front Street, Suite 590
Memphis, Tennessee
Phone: (901)578-6902
Fax: (901)578-8690

Attorney for Plaintiff/Petitioner

## Questions Presented For Review

Under Rule 56 of the Federal Rules of Civil Procedure, what are the kind or types of circumstantial evidence that is sufficient to require a reviewing court to analyze prior to granting or denying a Motion for Summary Judgment in Title a VII race discrimination and 42 U.S.C. § 1981 race discrimination case?

In a failure to promote case, is evidence that tend to suggest the falsity of the employers' legitimate non discriminatory reason for its employment decision relevant when the evidence comes from a different decision maker who works in a like position in a different geographical location but within the same company?

## Parties to the Proceedings

The parties to the proceedings include Michelle Ross ("Ross") a resident of Memphis, Shelby County Tennessee and Pfizer, Inc., ("Pfizer") a non governmental corporate entity with its principal place of business in New York, New York.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . . i

PARTIES TO PROCEEDINGS . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1a

JURISDICTION . . . . . 3

STATUTORY PROVISIONS INVOLVED . . . . . 1

STATEMENT OF THE CASE . . . . . 3

FACTS . . . . . 4

DECISION OF THE DISTRICT COURT . . . . . 11

DECISION OF THE SIXTH CIRCUIT . . . . . 13

REASONS FOR GRANTING PETITION . . . . . 14

I. This Historical Framework For Determining Whether Sufficient Circumstantial Evidence Exists to Allow a Discrimination Case To Be Decided By The Trier Of Fact . . . . . 16

A.. This Case Is An Excellent Vehicle To Resolve An Important Question

of Federal Law Impacting The Application of Rule 56 to Title VII Race Discrimination And 42 U.S.C. § 1981 Cases . . . . . 21

B. The Panel failed to analyze the facts surrounding Pfizer's Human Resources Manager admitting that Pfizer treated Ross differently and thus failed to analyze whether Pfizer's legitimate reason was insufficient to motivate the decision. . . . . 24

C. The shear weight of the circumstantial evidence presented at Rule 56 clearly demonstrates that reasonable jurors could find that Pfizer's legitimate reason is not worthy of credence and therefore pretext for discrimination. . . . . 25

II. The Circuit Courts Of Appeal Have Increased The Quantum Of Evidence That A Plaintiff Must Produce To Create An Inference Of discriminatory Intent At The Pretext Stage.

CONCLUSION . . . . . 34

APPENDIX

*Ross v. Pfizer, Inc.* District Court Opinion . . 1a

TABLE OF AUTHORITIES

*Anderson v. Liberty Lobby, Inc.*,
477 U.S. 242, 251-52,
106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) . . . . . 21

*Bender v. Hecht's Dep't Stores*,
455 F.3d 612, 626-27 (6th Cir. 2006) . . . . . 28

*Bibbs v. Bd. of Trustees*,
No. 98-3029, 1999 U.S. App.
LEXIS 18303, at 11 (7th Cir. July 30, 1999) . . . . . 31

*Bucknell v. Refined Sugars Inc.*,
82 F.Supp 2d 151, 157 (S.D. N.Y. 2000) . . . . . 31

*Bullington v. United Air Lines, Inc.*,
186 F.3d 1301, 1318 (10th Cir. 1999) . . . . . 31

*Celotex Corp. v. Catrett*,
477 U. S. 317, 323 (1986) . . . . . 21

Deines v. Tex. Dep't of Protective & Regulatory Servs.,
164 F.3d 277, 279 (5th Cir. 1999) . . . . . 28

*Fischbach v. D.C. Dep't of Corr.*,
86 F.3d 1180, 1183 (D.C. Cir. 1996) . . . . . 30

*Hughes v. Koppers Industries*,
Inc, 96-2625, 1997 U.S. App.
LEXIS 223 (7th Cir. Jan. 3, 1997) . . . . . 31, 32

*Kurincic v. Stein, Inc.*,
30 Fed. Appx 420, 426 (6th Cir. 2002) . . . . . 30

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
475 U.S. 574, 587 (1986) . . . . . 21

*McDonnell Douglas Corp v. Green*,
411 U.S. 798, 801 (1973) . . . . .14, 17, 18, 19, 23, 24, 33

*Millbrook v. IBP, Inc.*,
280 F.3d 1169, 1180 (7th Cir. 2002) . . . . . 28

*Patterson v. McClean Credit Union*,
491 U.S. 164, 188 (1989) . . . . . 19

*Reeves v. Sanderson Plumbing Products, Inc.*,
530 U.S. 133 (2000) . . . . . 5, 20, 21

*Romero v. Banco Popular de P.R.*,
35 F. Supp. 2d 195, 199 (D.P.R. 1999) . . . . . 33

*Sampath v. Concurrent Technologies Corporation*,
299 Fed. Appx. 143, 145 (3rd Cir. 2008) . . . . . 30

*St. Mary's Honor Center v. Hicks*,
509 U.S. 502, 511, 113 S.Ct. 2742,
125 L.Ed.2d 407 (1993) . . . . . 14, 17, 18, 20

*Simms v. Okla. ex rel. Dep't Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) . . . . . 28

*Tex. Dep't of Cmty. Affairs v. Burdine*,
450 U.S. 248, 253-54 (1981) . . . . . 14, 17, 18

*United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983) . . . . . 32

STATUTES:

42 U.S.C. § 1981 . . . . . 2, 3, 4, 14, 16, 22, 23, 29

42 U.S.C. § 2000e et seq. . . . . 3, 4, 14, 18, 29

42 U.S.C. § 2000e-2(a)(1) . . . . . 1

Fed. R. Civ. P. 56(c) . . . . . 20, 22

## PETITION FOR WRIT OF CERTIORARI

Petitioner Michelle Ross respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the district court (App., *infra*, **1a-18a**) is an unreported slip opinion No. 65 CV 2336 (W.D. Tenn. March 30, 2009). The opinion of the court of appeals (App., *infra*, **19a-35a**) is an unreported opinion reported at 2010 FED App. 0184N (6th Cir. 2010)

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on March 23, 2010. Ross sought Enbanc review and by order dated May 10, 2010, Ross' request was denied. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

**42 U.S.C. § 2000e-2(a)(1)**

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national

origin.

**42 U.S.C. § 1981**

a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

## STATEMENT OF THE CASE

Ross' cause of action arises out of The Civil Rights Act of 1991, 42 U.S.C. § 1981 as amended, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The trial court entered a summary judgment dismissing Ross' failure to promote claim as well as her constructive discharge claim. App *infra* **14a and 18a.**

In so doing, the trial court held that no reasonable jury could conclude based upon the evidence it reviewed that a genuine issue of material fact remained as to Ross' claims that Pfizer failed to promote her on account of race as well as Ross' constructive discharge claim. App *infra* **15a-17a**. Thereafter the trial court entered judgment on behalf of the Pfizer on March 30, 2009.

On appeal, The United States Court of Appeals for the Sixth Circuit affirmed the district court's order. The Court of Appeals like the district court held that Ross failed to come forward with sufficient evidence to counter Pfizer's legitimate non discriminatory reason for its promotion decision. App. *Infra* **28a-35a**. In so doing, the Sixth Circuit stated that Ross had no evidence of "emails or other evidence that would contradict Pfizer's assertion of the reason for its decision." App. *Infra* **28a** . The Sixth Circuit also affirmed the district court's rationale as to Ross' constructive discharge claim. App *infra* **33a-35a**.

## FACTS

This case arises out of Ross' claim that she was denied a promotion in violation of Title VII, 42 U.S.C. 2000(e) et. Seq. and 42 U.S.C. § 1981 as amended by the Civil Rights Act of 1991. Ross an African American Female began her employment with Pfizer in August 2000 as a Staff Accountant. Prior to joining Pfizer, Ross earned a Bachelor's Degree in Accounting from Mississippi State University in 1993. In 1994, Ross earned a MBA also from Mississippi State University. In 2001, Ross completed all the requirements to become a certified public accountant in the State of Tennessee.

Before working with Pfizer, Ross gained prior management experience in an accounting environment working as the office manager for Southland Truck Center in Memphis, Tennessee. Ross worked for Helena Chemical Company in Memphis, Tennessee as a general ledger accountant for nearly three years until she accepted a position with Pfizer as a Staff Accountant. Ross performed her job functions in an exemplary manner while employed by Pfizer and prior to seeking the promotion, Pfizer promoted Ross to Senior Staff Accountant in the benefits department at its Memphis location.

Sometime in 2005, Monica Morgan ("Morgan") became the Manager of the Corporate Accounting and Analysis ("CA&A") department. When Morgan joined Pfizer, there were four supervisor positions within CA&A reporting to her and the positions were held by Tim Reynolds ("Reynolds") Donna Kook ("Kook"), Laurie Ford ("Ford"), and Rhonda Bush

("Bush"). Each Supervisor worked in a particular area of the CA&A department and managed a team of Staff and Senior Staff Accountants.

Reynolds managed benefits accounting; Kook managed bank reconciliations; Ford managed financial reporting; and Bush managed financial reporting, including tax and royalties accounting. Reynolds' team was responsible for reporting benefits accounting to corporate. Ford's team was responsible for consolidation of the balance sheet and income statements and rolling them up to corporate. Bush's team was responsible for financial reporting, including tax, royalties, and debt and reporting that data to the corporate office in New York, New York where they are compiled and later reported to the Securities and Exchange Commission ("SEC"). Kook's team was responsible for reconciling Pfizer's cash accounts to the bank statements. According to Morgan, the "building blocks" for Pfizer's financial reporting to the SEC are prepared in the Memphis CA&A department.

Nonetheless, each department reports its balance sheet entries to the corporate office in New York through the same internal company system. Prior to Ross' seeking the promotion to the supervisor position in Bush's area, Ross was instrumental in assisting the whole CA&A department with implementing the EREW reporting system which is the company's web based reporting system used by the CA&A department to report the financial information to the corporate office in New York. The Memphis CA&A department does not report the financial statements or balance sheets directly to the SEC. Every specialty area within CA&A including

benefits reports their responsibility to corporate accounting in New York where they are combined and then reported to the SEC.

From approximately 2001 forward Reynolds was Ross' direct supervisor in the benefits section of the CA&A department in Memphis. In February 2005, Ross was promoted to Senior Staff Accountant in the CA&A department. Although Ross has not been employed by a public accounting firm, Ross was familiar with public accounting functions in that she had been preparing financial statements since 1996; she worked with auditors by gathering information for them while employed by Helena Chemical Company; worked with the Financial Reporting manager at Helena Chemical; and was instrumental in the computer based reporting to the New York office while employed by Pfizer in Memphis.

Ross had more experience, more supervisory experience and tenure with the company than the White candidate ultimately selected for the promotion. Although Ross worked in the benefits section of the CA&A department, Morgan admitted that Ross had all the necessary skill sets needed for the open supervisor position to include: (1) experience analyzing financials; (2) experience meeting deadlines; (3) experience performing project work; (4) experience preparing research on projects; (5) analytical and critical thinking skills; and (6) Ross was in a position to communicate with the various departments within Pfizer.

Morgan admitted while going over the posting for the position at issue in this case during her deposition that someone working in the benefits section would

have a "higher level of ability to be creative and have critical thinking skills." Also in the open supervisor position, a requirement for being able to do the work is an understanding of General Accepted Accounting Principals ("GAAP").

In May 2006, Supervisor Ronda Bush was promoted to the position of Manager in the General Ledger department, leaving a vacant Supervisor position in the CA&A department. Pfizer posted the opening for the Supervisor position.

The posting for the open CA&A Supervisor position listed five years accounting experience with "three plus years of big 4 public accounting (audit)" experience preferred. In contrast to the preference set forth in the job posting, Morgan, who drafted the notice for the position testified during her deposition that the open CA&A position does not report the financials to the SEC nor do they perform public accounting (audit) functions in that department.

Although Ross did not previously work for a public accounting firm, Ross submitted her resume for consideration to the open supervisor position. After submitting her resume, Morgan invited Ross to interview beginning on May 22, 2006.

During Ross' initial interview she interviewed with Ford, Reynolds, Bush, and Morgan on May 22 and May 23, 2006. The other candidates that were selected to interview for the open supervisor position were Amy Shackelford ("Shackelford"), Susan Smith ("Smith"), Kook, and Angela French ("French"). Shackelford, Smith, and Kook are Caucasian. Ross

and French were the African-American candidates who applied for the open supervisor position.

Shackelford had prior experience working for KPMG. In addition, Shackelford served as interim Supervisor in Ford's position while Ford was on maternity leave.

After the interviews, Bush, Ford, and Reynolds gave Morgan their feedback and recommendations regarding the two candidates who should proceed to the second round of interviews. On May 25, 2006, Ross learned from Morgan that Shackelford and Smith were selected for a second round of interviews for the Supervisor position.

According to Morgan, Ross was not selected for the second round of interviews because Ross did not have three years public accounting/audit experience working for one of the big four (4) public accounting firms as Shackelford and Smith and because Ross did not have the necessary supervisory experience. Kook who is white was already a supervisor in the CA&A department at the time she applied for the open Supervisor position. Although Kook was not selected for the promotion and/or position, Morgan made it clear that none of the departments within CA&A were considered preferred or more critical than the other and benefits, the Department that Ross worked in, had to be completed before Pfizer can close the books.

Ross and French, the other African American that applied for the position was not selected for the second round of interviews. French worked at Ernst & Young, a public accounting firm in tax. French

had public accounting experience and exposure to tax related issues (one of the primary duties of the supervisory position at issue) but was not selected for the position due to her allegedly not having the audit experience (a duty not performed within the supervisors position at issue).

Although Ross was not selected for the open supervisor position allegedly due to her lack of public accounting experience and lack of supervisory experience, the only skill set required to work in the financial reporting including tax and royalties department is an accounting degree and to be a certified public accountant ("CPA").

Dan Brown ("Brown") the Human Resources ("HR") manager admitted under that the Pfizer treated Ross differently than the white candidates because Pfizer did not give Ross credit for her prior supervisory experience as it did the two white candidates that made the second round of interviews.

The financial statements are reported from Pfizer's corporate office in New York directly to the SEC. Pfizer promoted Reynolds a white manager, to a position in New York that actually reports the financial statements directly to the SEC. Although the office in Memphis does not report the financial statements directly to the SEC nor does the Memphis office perform auditing functions, the Memphis Office required Ross to have public accounting experience while the New York office made no such requirement of Reynolds.

Ross attempted through discovery to ascertain whether Pfizer required its managers in New York to

have public accounting experience since it was in New York where SEC reporting and auditing functions were actually performed. Pfizer objected and would not produce any witnesses nor provide any documentation regarding this issue. Ross filed a Motion to Compel that was denied by the Magistrate Judge. Ross later filed an Appeal of the Magistrate's Order because she learned while the Motion was pending that Reynolds' a white employee was promoted to work in Pfizer's New York office working in the external reporting group and he does not have any public accounting experience. Ross on the other hand, was passed over for promotion in a position that does NOT report the financial statements to the SEC, the primary factor that Pfizer stated as its legitimate business decision to deny Ross the promotion.

When Ross showed up for her interview with Morgan she commented to Ross that "two people would go on to the second round, and that she was not going to let *this* monkey be on her back." The comment offended Ross and Ross thought that the comment was racial in nature. Ross believed that Morgan saw her as a color and that Morgan's use of the term monkey helped her to know that. Ross also believed that Morgan's statement was "something negative." Also, Ross thought that the phrase was negative because Morgan used the phrase in a "negative connotation in a negative way" during the interview with Ross.

Morgan on the other hand in her deposition related that although ***she made the comment to Ross***, she was referring to a project that she was working on at the time that had nothing to do with the interview process. Although Morgan denied that her

statement had something to do with the interview process, Brown in the company's position statement to the EEOC stated that Morgan's comment "alluded to the interview process." However, Brown testified in his deposition that when he asked Morgan whether she made the statement, Morgan originally denied making the statement. Nonetheless, Morgan testified in her deposition that during the investigation into Ross' allegations of discrimination, Brown explained to her that African American's are offended by the term because of the history of African Americans being referred to as "porch monkeys."

On June 1, 2006, Pfizer announced that Shackelford had been selected for the open Supervisor position. Morgan who created the job posting was the sole decision maker.

According to Morgan, she allegedly selected Amy Shackelford for the open Supervisor position because Shackelford had the preferred public accounting audit experience she gained while working at KPMG before joining Pfizer. Although, Morgan allegedly selected Shackelford because she worked for a "big 4" public accounting firm, Morgan agreed that public accountants are auditors that "check the accuracy of the balance sheet in the financial statement to make sure that they are correct ... in conformity with GAAP." An accountant learns GAAP in their college coursework which prepares them to become certified public accountants.

## DECISION OF THE DISTRICT COURT

The District Court granted summary judgment in favor of Pfizer, dismissing the case in its entirety.

The District Court held that Pfizer was entitled to judgment as a matter of law on Ross' failure to promote as well as Ross' constructive discharge claims.

The District Court found that Morgan's statement to Ross that "two people were going to the second round of interviews and that she was not going to let *this* monkey be on her back" was not either direct or indirect evidence of discrimination. The District Court found that no reasonable jury which would have to include African Americans could find Morgan's comment either direct or indirect evidence of race discrimination.

Next, the District Court held that Ross did not have sufficient evidence from which a reasonable jury could determine that Pfizer's legitimate non-discriminatory reason for its failure to promote Ross was pretext for unlawful discrimination. The District Court after acknowledging the evidence that public accounting auditing duties are not performed in the Memphis office held that Ross "has offered no evidence to show that Defendant was in any way unreasonable to consider public accounting audit experience relevant in these ways."

Although there was other evidence in the record, the District Court did not consider it. First, the District Court did not analyze proof that Ross presented where Pfizer admitted that it treated Ross differently when it credited two white applicants with their prior supervisory experience but failed to credit Ross with her prior supervisory experience. Moreover, the District Court found that Reynolds' promotion in New York was not relevant or reasonably calculated

to lead to the discovery of admissible evidence. The District Court stated that "[t]he court fails to see how any potential information possessed by the New York office is related to Ross's discrimination allegation involving the Tennessee office."

**Decision of the Sixth Circuit**

The Panel in the Sixth Circuit affirmed the District Court's grant of summary judgment. However, the Sixth Circuit disagreed with the District Court's finding that in all circumstances the comment "two people would go on to the second round, and that she (Morgan) was not going to let *this* monkey be on her back" in all circumstances is neither direct or indirect evidence of racial animus. The Panel in the Sixth Circuit found that Morgan's statement coupled with her inconsistent explanation is indirect evidence of discrimination. Nonetheless, the Panel did not review or analyze that evidence at the pretext stage prior to finding that Ross had insufficient evidence that Pfizer's legitimate reason for its promotion decision was pretext for discrimination.

The Panel found that Ross' discovery request for information regarding Pfizer's promotions in its New York office where SEC reporting actually takes place was not logical and as a result not reasonably calculated to lead to the discovery of admissible evidence. In a failure to promote case, in some instances, the only place that a plaintiff may look to determine the falsity of a decision maker's request for certain background qualifications may be at another location where the work is actually conducted. The Panel like the District Court did not analyze all the evidence or even allow Ross to

present other evidence that reasonable jurors could have believed supported Ross' evidence of pretext. The Panel asserted that Ross failed to come forward with "emails or other evidence" that would create an issue of fact as to Pfizer's legitimate non discriminatory reason for its employment decision.

## REASONS FOR GRANTING THE PETITION

Ross respectfully submits that there exists a substantial legal justification for this Court to grant her petition for writ of certiorari and review the Sixth Circuit's decision. First, when congress enacted Title VII, 42 U.S.C. § 2000(e) et seq. and 42 U.S.C. § 1981, the law was designed to stamp out overt as well as the more subtle forms of race discrimination. In keeping with the law's promise of stamping out even the subtle forms of race discrimination, this Court adopted the burden shifting framework articulated in *McDonnell Douglas Corp v. Green*, 411 U.S. 798, 801 (1973);*Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) as well as in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The Sixth Circuit like other trial and appellate courts all over this country are heightening the proof necessary to prove pretext at Rule 56(c) of the Federal Rules of Civil Procedure. In so doing, courts under the guise of its "gate keeping" functions are granting motions for summary judgment making it harder and in most cases impossible for plaintiffs to prove the subtle forms of discrimination. Indeed, the courts are requiring plaintiffs to come forward with direct rather than indirect evidence of discrimination

in order to rebut the employers' legitimate non discriminatory reason for its employment decision. Courts as well as Practitioners need guidance from this Court as to the type and kind of evidence that is sufficient for a trial court to allow the ultimate issue of discrimination to go to the jury utilizing indirect evidence.

Next, in trying to gather evidence to support Ross' theory that Pfizer's legitimate non discriminatory reason for its employment decision was pre-text for discrimination, Ross sought to discover whether the Pfizer's New York office required its managers to have big 4 public accounting experience since it was the New York office, not the Memphis office that made public filings to the SEC. In affirming the District Court, the Sixth Circuit surmised that since different decision makers were responsible for the decision to promote Reynolds in New York and not to promote Ross in Memphis, the District Court was correct in denying the discovery. The problem with the Sixth Circuit's rationale is that the analysis regarding different decision makers is more probative in disparate treatment cases concerning similarly situated individuals. However, in cases where the only proof of the falsity of the employer's explanation can be found at a different employing unit in a different geographical location within the same company, courts should not apply a blanket rule. If this rationale is left undisturbed by this Court, plaintiffs all over the country are potentially left without a way to prove race discrimination under facts similar to those in the case at bar.

Finally, the District Court as well as the Sixth Circuit failed to review ***all*** of the material facts that

were properly before the Courts. This Court should exercise is supervisory powers and grant the writ of certiorari in order to give guidance surrounding what this Court meant when it held that at summary judgment, that Court's should review all the material facts.

## I. This Historical Framework For Determining Whether Sufficient Circumstantial Evidence Exists to Allow a Discrimination Case To Be Decided By The Trier Of Fact.

Assuming arguendo that Morgan did not want to promote an African American for discriminatory reasons and that she drafted the announcement for the open supervisor position in a way to ensure that a white applicant would receive the position, no one would argue that Title VII and 42 U.S.C. § 1981 would not be implicated. The question becomes, what evidence of race discrimination must a plaintiff produce in order to establish a triable issue of fact in order to disprove the employer's legitimate non discriminatory reason for its employment action. In many cases, it appears that courts are increasingly holding plaintiffs to high evidentiary burdens and have all to often granted summary judgment in cases where reasonable jurors may have inferred the ultimate issue of discrimination. The Sixth Circuit's disposition of Ross' failure to promote claim is just one example of how hundreds of plaintiffs all over the country have lost their case at summary judgment after the Court heightened the proof necessary to overcome an employers' motion for summary judgment. Simply put, courts are requiring plaintiffs to prove their cases with direct

rather than indirect evidence of discriminatory intent.

When overt or direct evidence of racial bias is not evident and in order to stamp out the more subtle forms of race discrimination, this Court held that a plaintiff may avail herself of the shifting burdens framework established by the Court in *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed.2d 207, 101 S. Ct. 1089 (1981). Indeed, this Court in *McDonnell Douglas* emphatically confirmed the purpose of Title VII when it stated that " [t]here are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of **1824] such decisions, it is abundantly clear that *Title VII tolerates no racial discrimination, subtle or otherwise.*" See, *McDonnell Douglas Corp v. Green*, 411 U.S. 798, 801 (1973). (emphasis added).

Under the burden shifting approach, a plaintiff must first prove her *prima facie* case by a preponderance of the evidence. *St. Mary's*, 509 U.S. at 506. The *prima facie* case then creates a presumption of discrimination which places the burden on the employer to come forward with a "legitimate, nondiscriminatory reason" for its conduct. *Id.* at 507. This burden on the employer, however, is only one of production of admissible evidence. *Id.* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

(quoting *Burdine*, 450 U.S. at 253). Once the employer articulates its legitimate, nondiscriminatory reason, the "shifted burden of production [becomes] irrelevant." *St. Mary's*, 509 U.S. at 507. The plaintiff then must prove that she was the victim of intentional discrimination. In order to make this showing,

> The plaintiff then has the "full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," [*Burdine*] at 256, 67 L.Ed.2d 207, 101 S. Ct. 1089, *and* that race was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.

*St. Mary's*, 509 U.S. at 507-508 (emphasis supplied).

However, when determining what evidence is probative of the ultimate issue of discrimination, this Court in *McDonnell Douglass* instructed that plaintiffs may avail themselves of several different kinds of and types of circumstantial evidence. Specifically, the Court found relevant evidence that tends to show "that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it,

but only if this criterion is applied alike to members of all races." *McDonnell Douglas*, 41 U.S. 798 at 804.

This Court went on to say that

> [o]ther evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Id.* at 805.

In the failure to promote cases, this Court asserted at the pretext stage a plaintiff is not limited to evidence of a certain type.[1] See, *Patterson v. McClean Credit Union*, 491 U.S. 164, 188 (1989). Indeed in *Patterson* this court found that a district court limiting a plaintiff to proof that she was "better qualified" is error. See, *Patterson*, 491 U.S. 164 at

[1] The Panel in the Sixth Circuit found that in order for Ross to prevail on the issue of pretext Ross needed to find "emails or other evidence that would contradict Pfizer's assertion of the reason for its decision." App *infra* **23a**.

188. The *Patterson* Court instructed lower courts that

> [t]here are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual. Thus, for example, petitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position. See *supra, at 178.* While we do not intend to say this evidence necessarily would be sufficient to carry the day, it cannot be denied that it is one of the various ways in which petitioner might seek to prove intentional discrimination on the part of respondent. *She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual.*

*Id.* (emphasis added).

Recognizing the above-outlined burdens on the parties and the circumstantial evidence required to meet each element, issue arises over what happens when the plaintiff comes forward with evidence and proves that the employer's articulated reason is not the true reason. *St. Mary's* makes it clear that, "a reason cannot be proved to be 'a pretext *for*

*discrimination*' unless it is shown *both* that the reason was false and that discrimination was the real reason." *St. Mary's*, 509 U.S. at 517 (Court's emphasis). Nonetheless this Court in *St. Mary's* stated that the elements of the *prima facie* case and falsity *may* be sufficient to demonstrate *intentional* discrimination. *Id.* At 511. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity [lying]) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. This Court upheld the reasoning from *St. Mary's* in *Reeves v. Sanderson Plumbing* when Justice O'Connor writing for a unanimous Court reiterated the point that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." (citation omitted).

In reviewing the evidence of pretext in the employment context under Rule 56(c) of Federal Rules of Civil Procedure, this Court has also held that a reviewing court review the record "taken as a whole." See, *Reeves v. Sanderson Plumbing Inc.*, 530 U.S. 133, 150-151 (2000) citing *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986). The standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250–251 (1986); see also *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, [or for summary judgment] the

court should review all of the evidence in the record. See *Reeves*, 530 U.S. at 151. Further, in reviewing *all the evidence*, this evidence ***should be viewed in the light most favorable to the non-movant, that all reasonable inferences are to be drawn in her favor, and that the judge is not to weigh the evidence or assess witnesses' credibility.*** *Id.* at 150-51 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

### A. This Case Is An Excellent Vehicle To Resolve An Important Question of Federal Law Impacting The Application of Rule 56 to Title VII And 42 U.S.C. § 1981 Race Discrimination Cases.

When applying these principles espoused in Rule 56 (c) to the pretext stage of a Title VII and/or 42 U.S.C. § 1981 case, it is crystal clear that that the Sixth Circuit failed to apply *all the evidence* to the elements of the claim; (2) failed to apply the facts in the light most favorable to Ross, the non-movant; and (3) impermissibly weighed the evidence in the light most favorable to Pfizer. After failing to analyze other kinds and/or types of circumstantial proof, the Panel found that "It is undisputed that Shackleford had big 4 experience and that Ross did not, so Pfizer's proffered explanation has basis in fact." App *infra* **23a**.

In reaching the ultimate conclusion that Ross did not have any evidence of pretext, the Sixth Circuit did not analyze or appropriately give weight to evidence that Morgan admitted that public accounting functions are not performed in the position at issue. Ross also discovered that the preference for big 4 public accounting was not required for a supervisory

position in New York where public filings actually take place.[2] This distinction cast doubt as to whether Morgan's preference was legitimate or rather born out of a discriminatory animus since public accounting experience was the only favorable credential the white employee selected for the position had on Ross. Certainly reasonable jurors could believe that since public accounting duties were not performed in the contested position, Morgan's request could have born out of a discriminatory animus.

Indeed, for the Sixth Circuit to decide that Morgan's preference had a basis in fact, or otherwise stated was not born out of a discriminatory animus, it unlawfully got into the mind of Morgan and unlawfully weighed the evidence in the light most favorable to Pfizer given the other evidence contained in the record. This is not the role of the Court but rather, such a role is preserved for the jury.

If an employer (such as Morgan who harbors a discriminatory animus) knows the difference between the backgrounds of its white and black

---

[2] Morgan asserted in her deposition that public accounting experience was helpful because of public filings with the SEC and prior auditing experience with large companies such as Pfizer. However, Ross' supervisor, Tim Reynolds, who is white and like Ross, has no public accounting background, was promoted by Pfizer to the management position in New York that actually reports the financial statements to the SEC. Ross argued in her brief to the Panel that if public accounting was necessary, it would have been required in New York where Pfizer actually reports the financial statements to the SEC and not in Memphis where they do not.

employees, it may then assert that this difference (the lack of public accounting experience) was exactly what they were looking for in the position, even though such experience was not relevant in order to successfully perform the challenged position. This is surely the type of and/or kind of circumstantial evidence and inferences that can properly be drawn there from that this Court has instructed lower courts to analyze at pretext stage in Title VII and 42 U.S.C. § 1981 cases.

B. The Panel failed to analyze the facts surrounding Pfizer's Human Resources Manager admission that Pfizer treated Ross differently and thus failed to analyze whether Pfizer's legitimate reason was insufficient to motivate the decision.

According to this Court in *McDonnell Douglas*, another way to prove by circumstantial evidence that an employers' legitimate reason is not worthy of credence is to show that the employer treated similarly situated white employees more favorable than its African American employees. See, *McDonnell Douglas*, 41 U.S. 798 at 804. In this case Ross presented facts that Pfizer's Human Resources manager admitted that Pfizer treated Ross differently than her similarly situated counterparts when they failed to credit or even acknowledge Ross' prior supervisory experience. Although, these facts were presented to the Panel in the Sixth Circuit, the Panel *sua sponte* did not place them in its factual summary or analyze them under this prong at the pretext stage. Instead, the Panel suggested that Ross find evidence of the "smoking gun" email or

"other evidence" without explaining what other evidence the Panel would have considered.

In a discrimination analysis this Court affirmatively instructed lower Courts to analyze circumstantial evidence that an aggrieved employee was treated differently than a similarly situated employee. At oral argument, the Panel in the Sixth Circuit took the position regarding Pfizer's failure to credit Ross with her prior supervisory experience that it did not matter because "at best Ross would have only come in second place." The assertion made by the Sixth Circuit clearly construed the evidence too narrowly and thus unlawfully weighed the evidence in the light most favorable to Pfizer. Indeed, had the Panel construed this evidence in the light most favorable to Ross as it is required to do pursuant to Rule 56 and this Courts' instructions in *McDonnell Douglass*, *Celotex* and *Patterson*, it would have found that reasonable jurors construing an admission from a Human Resources manager regarding discrimination (admitting to treating Ross differently), is evidence of discriminatory intent. Because the Panel failed to analyze this evidence, and in so doing, has so far departed from the accepted and usual course of judicial proceedings this Court should exercise its supervisory powers and grant Ross' Writ of Certiorari.

C. The shear weight of the circumstantial evidence presented at Rule 56 clearly demonstrates that reasonable jurors could find that Pfizer's legitimate reason is not worthy of credence and therefore pretext for discrimination.

Ross produced enough circumstantial evidence for a reasonable jury to infer that the proffered explanation for its promotion decision is unworthy of credence and a pretext for unlawful discrimination. The totality of the circumstantial evidence in the record on appeal was as follows: (1) Reynolds a white manager was not required by Pfizer to have public accounting experience to actually manage the department in New York that reports the financials to the SEC; (2) Pfizer required Ross an African American on the other hand to have this experience in Memphis where no financial reports were submitted to the SEC; (3) Morgan commented to Ross during the interview for the open supervisory position that "she needs to get this monkey off her back" which offended Ross coupled with Morgan's inconsistent explanation of the comment and her outright denial in even making the statement to Dan Brown, Pfizer's Human Resource manager; (4) Further, Pfizer admitted that it treated Ross differently than her white counter-parts when it failed to credit Ross with her prior supervisory experience while crediting her white counter-parts; (5) Moreover, Pfizer excluded the one African American employee that had public accounting tax experience because she did not have audit experience even though the position had tax implications, but not audit; and (6) Lastly, Pfizer knew that Ross had more tenure with the company, more supervisory experience as well as more accounting experience but selected a white female whose only credential that was more favorable than Ross was the fact that she had public accounting audit experience while Ross did not. A reasonable jury hearing all this other proof, may disbelieve that public accounting audit experience was the actual reason the white candidate

was chosen and infer the ultimate issue of discrimination.

The Panel in the Sixth Circuit also held that circumstantial evidence that tends to disprove the need for public accounting audit experience in Memphis was not relevant. The Panel made this determination even though Morgan admitted that no public accounting audit duties are performed in the Memphis office and there is evidence in the record showing that Pfizer hired a white employee who has no public accounting experience to manage its New York office that actually reports the financials to the SEC. To require Ross to come forward with the "smoking gun" e-mail or other such evidence is asking the Ross to produce direct evidence of discrimination. Such an evidentiary requirement is in opposition to this Court's holdings in *McDonnel Douglas* and underscores the need for further clarification from this Court. It is clear based upon the rationale of the Sixth Circuit that the only way Ross could have prevailed on her claim of discrimination was to produce direct and not indirect evidence of race discrimination. Such a requirement so far departs from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory powers and grant Ross' Writ of Certiorari.

## II. The Circuit Courts Of Appeal Have Increased The Quantum Of Evidence That A Plaintiff Must Produce To Create An Inference Of discriminatory Intent At The Pretext Stage.

In a failure to promote case, when a trial Court determines that there is no additional circumstantial

evidence of pretext, a plaintiffs analysis' is limited at the pretext stage to evidence that tends to show either (1) the plaintiff's qualifications "were so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former," or (2) the plaintiff was "as qualified as or better qualified than the successful applicant" and the record also contains "other probative evidence of discrimination." *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626-27 (6th Cir. 2006). The Fifth and Seventh Circuits hold that at the pretext stage in failure to promote cases that a comparator demonstrates pretext ***only if*** the disparity is so great that "there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *See Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002) (quoting *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir. 1999)). *See Simms v. Okla. ex rel. Dep't Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) holding that "when two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is ***clearly better qualified,*** it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." (quotation omitted)).

This standard is troubling when considering motions for summary judgment primarily because the ultimate issue in a disparate treatment case involves the employer's intent. In these cases, Courts should use caution in granting summary judgment. Requiring plaintiffs to demonstrate the clear

superiority of their qualifications makes it more difficult to survive a motion for summary judgment and deprives plaintiffs of the opportunity to present their case to the ultimate fact finder.

Moreover, there is nothing in the framework established by this Court in *McDonnell Douglas Corp. v. Green*, and refined in *Texas Department of Community Affairs v. Burdine* and *St. Mary's Honor Center v. Hicks*, that compels the conclusion that plaintiffs must present evidence of clearly-superior qualifications. Indeed an argument can be made that the Circuits that require the "clearly better qualified" approach is not in harmony with this Court's holding in *Patterson v. McClean Credit Union*. In *Patterson*, this Court specifically held that a district court limiting a plaintiff to proof that she was "better qualified" is error. A requirement that a plaintiff produce evidence that she is "clearly better qualified" or that her qualifications "were so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former" is in stark contrast to this Court's holding in *Patterson*. Further, there is nothing in the text of the either 42 U.S.C. § 2000(e) et seq. or 42 U.S.C. § 1981 that requires a plaintiff to make such a finding for violations of these statutes in order to present her case to the jury.

The problem with this requirement is that it is very difficult for plaintiffs to demonstrate that they are clearly more qualified than the candidate selected by the employer. Employers normally hire and promote on the basis of multiple criteria. As a result, an employer can always point to at least one criterion,

which it claims is critical to the position, on which the plaintiff is weaker than the candidate selected. Indeed, on this very point, Ross in her Petition for Enbanc Review asked the Sixth Court to reconsider the Panel's holding that Reynolds' promotion in New York was not relevant or even discoverable because different decision makers made the decision to promote in New York as well as in Memphis. This evidence is clearly relevant to prove pretext because if Pfizer does not require managers in New York who actually manage the department where the actual SEC filings take place to have "big 4" public accounting experience, then reasonable jurors could believe that Morgan made that requirement in order to discriminate. At a minimum, the evidence is probative on the issue of falsity of the employers' legitimate reason.

Ross argued that due to this holding, one harboring a discriminatory animus may get to know the distinguishing background qualifications of its white and black employees and then pick one qualification out as relevant no matter how unrelated to the job. Then employer could assert that this distinguishing qualification is a preference for the promotion in the future even if they know that this preference is not truly needed for the position as evidenced by different promotions into similar positions at other locations in the company. Without an opportunity to review what qualifications are required in like and similar positions, outside of gathering direct evidence of discrimination, a plaintiff could NEVER prove a circumstantial case. This Court in fashioning the *McDonnell Douglas* burden shifting framework never intended for Court's to increase the quantum of circumstantial evidence which the Circuits are

currently requiring of plaintiffs.

There are other instances where the Circuits are making it impossible for plaintiffs to get their case to the ultimate trier of fact, the jury. A growing number of federal courts now require plaintiffs not only to prove that the employer's legitimate, nondiscriminatory reason was objectively false, but also that the employer did not "honestly believe" the reason it proffered for the challenged employment decision. See, e.g. *Kurincic v. Stein, Inc.*, 30 Fed. Appx 420, 426 (6th Cir. 2002); *Sampath v. Concurrent Technologies Corporation*, 299 Fed. Appx. 143, 145 (3rd Cir. 2008); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999); *Bibbs v. Bd. of Trustees*, No. 98-3029, 1999 U.S. App. LEXIS 18303, at 11 (7th Cir. July 30, 1999); *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996); *Bucknell v. Refined Sugars Inc.*, 82 F.Supp 2d 151, 157 (S.D. N.Y. 2000);

This so-called "honest belief" standard has made it virtually impossible for a plaintiff to prevail on an employer's motion for summary judgment absent direct evidence of the employer's discriminatory intent. For example, In *Hughes v. Koppers Industries*, Inc, 96-2625, 1997 U.S. App. LEXIS 223 (7th Cir. Jan. 3, 1997), Cornell Hughes, a black man, filed suit against Koppers Industries, his employer, for failure to promote him to the position of laboratory supervisor at Koppers's chemical plant. See *Hughes*, 1997 U.S. App. LEXIS 223, at 2-3. Koppers selected Traczek, a white man, for the position. *Id.* at 3. Hughes clearly had more experience than did Traczek, both within the

industry and with the firm. Hughes had worked in the chemical industry for nineteen years and with Koppers for more than five years. *Id.* Traczek, who received the promotion, had only four years of industry experience, all at Koppers. *Id.* Hughes, unlike Traczek, had discharged "all of the functions of supervisor." *Id.* Hughes also had trained some of his co-workers, including Traczek. *Id.* Koppers claimed that it hired Traczek because he had earned a college degree and because he had good leadership skills, effective oral and written communication skills, and could manage his workload under pressure and work without supervision. *Id.* at 7. The trial court granted summary judgment in favor of Koppers and the Seventh Circuit affirmed. *Id.* at 2.

Although Hughes's qualifications, in terms of industry, firm and supervisory experience, clearly exceeded those of Traczek, Hughes lacked the one objective qualification on which the employer based its decision: a college degree.[3] Hughes, 1997 U.S. App. LEXIS 223, at 7. The Seventh Circuit, however, concluded that such large disparities in objective qualifications did not even merit a trial. Instead, the court explained that the issue in the case was "not whether Hughes was more qualified than Traczek, but whether the employer could not have *honestly believed* that Hughes was less qualified than Traczek." *Id.* at 6 (emphasis added). In other words, what the Courts are requiring plaintiffs to overcome is the authenticity of the employer's belief about its

[3] Hughes majored in chemistry in college for two years, but had not earned his degree. Traczek had earned a degree in biology. The court did not question how a biology degree would benefit a supervisor in a chemical plant.

legitimate, nondiscriminatory reason, not the objective truth or falsity of the proffered reason, as required by this Court in *St. Mary's Honor Center* v. *Hicks and more recently Reeves* v. *Sanderson Plumbing*.

Further, these cases tend to run afoul of this court's instructions that there "seldom [is] "eyewitness' testimony as to the employer's mental processes." See, *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). The burden shifting framework established by this Court exists because plaintiffs often do not have evidence of their employers' subjective beliefs and motivations. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

These cases only represent a small portion of the cases where plaintiffs have been denied an opportunity to present their cases to juries. There are other opinions where the Courts for various other reasons did not allow the case to go to the jury. One such case, like Ross that did not make it to the jury even though there was evidence of potential racial bias was *Romero* v. *Banco Popular de P.R.*, 35 F. Supp. 2d 195, 199 (D.P.R. 1999). In *Romero* the court in (granting summary judgment for the employer on the plaintiff's race and national origin claims, noting that sworn statements by past and current supervisors that the employer had unwritten rules about not promoting black candidates do not constitute evidence of discriminatory intent because "general charges of discrimination... do not create a "case or controversy'"), aff'd in part, vacated in part, 212 F.3d 607 (1st Cir. 2000) (affirming the decision as to failure to promote and constructive termination

claims but remanding on a race-based harassment charge).

In preparing this writ, counsel on Lexis Nexis completed an all Federal and all State search since 1944 using the following terms, "failure to promote" and "Title VII" and "no evidence" /p pretext and affirmed and "summary judgment" finding 576 cases. When substituting the word affirmed in the search with "reversed and remanded" only 22 cases were found. Although all of these cases were not read by counsel, what this search indicates is that all too often plaintiffs are finding their cases thrown out of court prior to the court empanelling a jury of their peers.

Since Courts have heightened the proof requiring direct rather than indirect evidence of discrimination necessary to overcome an employers' motion for summary judgment in Title VII cases, this Court should exercise its supervisory powers and reaffirm its decisions in *McDonnell Douglas v. Green*, *St. Mary's v. Hicks*, and *Reeves v. Sanderson Plumbing*. If the current status of the law remains undisturbed, courts will continue to discount or fail to apply circumstantial evidence at the pretext stage making the standard such that the only way to prove discriminatory intent is through introduction of direct evidence of discrimination. If that pattern continues, then one would argue that congress only intended Title VII to be available to plaintiffs who come before the courts with the most extreme or egregious facts supporting their claim of discrimination. Accordingly, in order to preserve the intent of congress, to stamp out overt as well as subtle forms of discrimination, this Court should

exercise its supervisory powers and grant Ross' Writ of Certiorari.

## CONCLUSION

To correct the vestiges of discrimination and in order to make right the promise of freedom for African Americans and for those who traditionally did not enjoy the promise of the American dream, Congress enacted 42 U.S.C. § 2000(e) et seq. The primary purpose of the law was to stamp out the invidious vestiges of discrimination whether overt or subtle that placed a dark cloud over this country. This Court recognized that when it made that point crystal clear in *McDonnell Douglass*. Today Courts through the implementation of ridged evidentiary rules placed upon plaintiffs at the pretext stage have all but made it impossible for plaintiffs to survive motions for summary judgment without direct evidence of discrimination. As a result, Federal Court's are closing the courthouse to plaintiffs all over this country who believe that they have been the victim of unlawful discrimination.

The time is now appropriate for this Honorable Court to exercise its supervisory powers and reaffirm its holding in *McDonnell Douglass*. To insure that there is no confusion amongst the Circuits this Court should further expound upon the evidentiary requirements that would entitle a discrimination plaintiff to have their case decided by the jury and not the Court. The reach of Title VII as well as 42 U.S.C. § 1981 is not limited to those rare and few plaintiffs who come before the courts with direct proof of discrimination. The law was also designed to reach those who discriminate discretely. In order to

effectuate that purpose, this Court should grant Ross' Petition otherwise Title VII may necessarily become a toothless tiger.

Respectfully submitted,

Bradley W. Eskins

Counsel of Record
Bradley W. Eskins
50 North Front Street, Suite 590
Memphis, Tennessee 38103
(901) 578-6902

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

| | | |
|---|---|---|
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 07-2336-JPM-dkv |
| | ) | |
| PFIZER, INC., | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Pfizer, Inc.'s Motion for Summary Judgment (D.E. 37), filed on July 15, 2008. Plaintiff Michelle Ross responded in opposition on August 21, 2008 (D.E. 48). A hearing was held on the motion on September 25, 2008. Representing Plaintiff was James E. King, Jr., Esq. Representing Defendant were David L. Gordon, Esq., and Melissa Kotun, Esq.

For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

## I. BACKGROUND

This case comes before the Court on Plaintiff's employment discrimination claim. Plaintiff, an

African-American, worked for Defendant as a Staff Accountant in the Corporate Accounting and analysis Department ("CA&A Department") from August 2000 through July 2006. (Ross Dep. 11:14-15, 38:20-21, 56:14-19.) In February 2005, Plaintiff received a promotion to work as a senior staff accountant. (Id. at 40:2-13.) During this time, Staff and senior staff accountants reported to one of four supervisors, who in turn reported to Monica Morgan, the manager of the CA&A Department. (Morgan Dep. 20:2-10.)

In May 2006, Defendant posted an opening for a supervisor position in the CA&A Department. (Id. at 90:17-21.) Among other things, the posting listed as a preferred qualification "threeplus years of big 4 accounting (audit)" experience and "[p]revious supervisory experience." (Id. at 62:19–63:10, 73:15-18.) Defendant selected five candidates to interview for the supervisor position: Plaintiff, Amy Shackelford, Susan Smith, Donna Kook, and Angela French. (Id. at 106:12-16.) Three supervisors in the CA&A Department and Morgan interviewed the candidates. (Id. at 154:8–155:1.) Following the interviews, the supervisors provided Morgan with feedback and recommended two candidates who they believed should advance to a second round of interviews. (Id.)

At the conclusion of Plaintiff's interview, Morgan informed Plaintiff that only two people would be selected for the second round of interviewing. (Ross Dep. 97:16-18.) Morgan added that she was not "going to let this monkey" be on her back. (Id.) Plaintiff interpreted this statement to be a

derogatory remark[1] directed toward her (id. at 97:24-98:25), but Morgan was not aware of the connotation and understood the word to indicate "a weight on your back when you have workload bearing you down." (Morgan Dep. 46:19-21.)

Morgan selected Shackelford and Smith to partake in the second round of candidates, noting that they had the strongest skill sets for the position, including the preferred public accounting audit experience. (Id. at 107:9-11, 117:6–118:5, 120:24–121:19, 122:23–123:2.) By contrast, Plaintiff had no public accounting audit experience. (Ross Dep. 267:21–268:4.) Morgan further testified that Plaintiff was not chosen due to her limited exposure to financial reporting other than in the benefits area. (Morgan Dep. 139:8-21.)

Morgan ultimately selected Shackelford for the promotion. (Id. at 117:9–118:2.) Morgan testified that Shackelford's prior experience working at KPMG[2] —

---

[1] As explained during the deposition of Plaintiff and Monica Morgan, the word "monkey" can have a negative connotation when used to refer to an African-American individual. (Ross Dep. 98:8-9 ("[I]t is something that we just do not — we've been called that, we've been held to that type of a lower standard."); Morgan Dep. 46:16-18 ("[Monkey] was offensive to African-Americans because monkey meant — it had a reference to porch monkey.").)

[2] Morgan testified that working at a "big 4" accounting firm provided exposure to large, Fortune 500 companies like Defendant and that individuals with public accounting audit experience typically have a higher level of understanding of "the holistic balance sheet, income statement, and financial reporting process" necessary for a supervisor. (Morgan Dep. 73:19–74:2, 75:6- 17.)

a "big 4" accounting firm — as well as her service as Interim Supervisor for Supervisor Laurie Ford's financial reporting area while Ford was on maternity leave were determinative factors in choosing Shackelford. (Id.)

Following the selection of Shackelford, Morgan met with Plaintiff to provide feedback on the interview process and discuss ways in which Plaintiff could obtain a promotion in the future. (Ross Dep. 225:3-12; Morgan Dep. 49:21–50:15.) Tim Reynolds, Plaintiff's supervisor, told Plaintiff that he hoped she would stay with the company and informed Plaintiff that Morgan wanted to meet with her to discuss giving Plaintiff more leadership possibilities. (Ross Dep. 297:6-16.) Plaintiff spoke to Human Resources Director Dan Brown, who discussed additional developmental opportunities with her and told Plaintiff he would support her attending leadership conferences and gaining additional experience with the audit department. (Id. at 285:19-22, 288:11-15, 289:4-7.) Brown also told Plaintiff that Reynolds always had spoken highly of her and considered Plaintiff to be a "top talent." (Id. at 306:6-9.)

On May 25, 2006, the day on which she discovered she was not selected for the second round of interviews, Plaintiff began reaching out to recruiters and headhunters in search for a new job. (Id. at 103:17–104:6, 105:10–106:14.) On June 1, 2006, Plaintiff applied for a job with Federal Express, and she accepted a position with the company as a senior accountant on July 14, 2006. (Id. at 265:13–266:8, 263:8-10, 275:1-20.)

Plaintiff filed the instant lawsuit on May 11, 2007. Plaintiff asserts that Defendant selected Shackelford — who Plaintiff argues was a less qualified candidate — because she is Caucasian. (Compl. ¶¶ 16-18.) Plaintiff further contends that she was constructively discharged from her position because following the selection of Shackelford, her co-workers "stopped effectively communicating" with her and no longer included her in meetings. (Ross Dep. 149:5-17.) Plaintiff testified that she "second-guesses" herself as a result of her experience with Defendant, wakes up in the middle of the night on occasion, and is prone to cry when discussing Defendant's decision not to hire her. (Id. at 156:3-157:5.) Plaintiff seeks equitable relief, compensatory damages, and punitive damages. (Compl. ¶ 19.)

Defendant now moves for summary judgment on Plaintiff's claims.

## II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir.

1989). In considering a motion for summary judgment, however, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc.,799 F.2d 1128, 1133 (6th Cir. 1986), *reh'g denied*; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Abeita v. TransAm. Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998), *reh'g and reh'g en banc denied.* A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

## III. ANALYSIS

Defendant moves for summary judgment as to Plaintiff's claims for (A) race discrimination/failure to promote, (B) constructive discharge, and (C) emotional distress. Each of these issues, along with Defendant's claim for attorneys' fees, is addressed below.

**A. Failure to Promote**

Under Title VII, an employee cannot "discharge any individual" or "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Section 1981 further prohibits intentional racial discrimination in constructing the terms and conditions of employment. 42 U.S.C. § 1981. "The elements of [a] *prima facie* case as well as the allocations of the burden of proof are the same for employment claims stemming from Title VII and § 1981." Noble v. Brinker Int'l, Inc., 391 F.3d 715, 720 (6th Cir. 2004).

To establish employment discrimination, Plaintiff must "either provide direct evidence of discrimination or introduce circumstantial evidence that would allow an inference of discriminatory intent." Anthony v. BTR Auto. Sealing Sys., Inc., 339 F.3d 506, 514 (6th Cir. 2003). Plaintiff must put forth a *prima facie* case to establish a presumption of unlawful conduct, which Defendant can then rebut by producing legitimate, nondiscriminatory reasons for not promoting Plaintiff. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). If Defendant makes such a showing, Plaintiff must prove that Defendant's proffered reason was a pretext for discrimination. Id.

Here, Defendant contends that (1) Plaintiff has no direct evidence of discrimination and (2) Plaintiff cannot show that Defendant's proffered reason for not promoting Plaintiff was a pretext for discrimination.

**1. Direct Evidence of Discrimination**

In discrimination cases, "direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Jacklyn v. Schering-Plough Healthcare Products Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999). Once a plaintiff puts forth credible direct evidence, the defendant has the burden of
persuasion to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination. Id.

Plaintiff asserts that Morgan's statement about the "monkey on her back" constitutes direct evidence of discrimination because reasonable jurors could construe the statement to be racially derogatory. Courts that have analyzed the phrase "monkey on your back" have held it not to be a racially charged term, however. In Gregory v. Widnall, the Ninth Circuit found that a drawing of a monkey on an interoffice memo was insufficient to raise a jury question. 152 F.3d 1071, 1074-75(9th Cir. 1998). The Court noted that the memo was accompanied by a verbal statement that the drawing was intended to remind
officers not to "get the monkey off their back" by passing off responsibilities. Id. Similarly, in Bell v. Waste Mgmt., the court held that the word "monkey" when used in the phrase "get the monkey off your back" is "not a racial epithet, but rather refers to passing responsibilities to others." 2004 WL 2451416 at *6 n.2 (D. Del. Oct. 29, 2004) (citing Gregory). Following this reasoning, Morgan's statement about

the "monkey on your back" does not constitute direct evidence of racial discrimination by Defendant.[3]

**2. Defendant's Proffered Reason for Its Promotion Decision**

In addition to arguing that Plaintiff lacks direct evidence of discrimination, Defendant also asserts that Plaintiff cannot show that its proffered reason for its promotion decision was a pretext for unlawful discrimination. The parties agree that Defendant has articulated a legitimate, non-discriminatory reason for its decision: that Morgan assessed Shackelford to be the best qualified candidate.[4] Under Burdine, Plaintiff then has the burden of showing that this reason is merely a pretext for discrimination.

Plaintiffs "can demonstrate pretext by showing that the proffered reason (1) had no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." Hopson v. DaimlerChrysler Corp., 306 F.3d 427, 434 (6th Cir. 2002). Plaintiff characterizes Defendant's justification for its promotion decision as a pretext by making the following arguments: (a) Defendant's preference for public accounting audit experience was not relevant to the supervisor position and (b) Plaintiff had more

---

[3] Plaintiff does not specifically argue that Morgan's statement constitutes indirect evidence of discrimination, but the Court notes that in accordance with Gregory and Bell, the statement cannot serve as indirect evidence either.

[4] Defendant articulated this reason in its Motion for Summary Judgment, and in her response, Plaintiff conceded that this reason met the "low" bar for the first step in the Burdine framework. (See Pl.'s Resp. to Def.'s Mot. For Summ. J. 8.)

tenure, general accounting experience, and supervisory experience and was thus more qualified than Shackelford to be a supervisor. These two arguments are addressed below.

### a. Preference for Public Accounting Audit Experience

Plaintiff does not dispute that Shackelford, unlike Plaintiff, had public accounting audit experience, but she contends that such experience was not relevant to the supervisor position. To support this argument, Plaintiff points to Morgan's testimony that the supervisor position for which Plaintiff applied performs no auditing duties and that the Memphis office does not report financial statements directly to the Securities and Exchange Commission ("SEC").[5] (Morgan Dep. 61:8-23.)

The "reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation." Wexler v. White's Furniture, Inc., 317 F.3d 564, 577 (6th Cir. 2003) (noting that several other circuits have reached the same conclusion); see also Hartsel v. Keys, 87 F.3d 795, 800 (6th Cir. 1996) (holding that plaintiffs must show that a defendant's "'business decision' was so lacking in merit as to call into question its genuineness") (quoting Dister v. Cont'l Group, Inc., 859 F.2d 1108, 1116 (2d Cir. 1988)).

---

[5] Morgan testified that one of the supervisors reports the financials, balance sheet, and financial statements to Defendant's corporate accounting office in New York, which then submits Defendant's financial statements to the SEC. (Morgan Dep. 60:10-61:3.)

Here, Defendant has offered testimony from four employees that public accounting audit experience was relevant to the supervisor position[6] even though

[6] Morgan testified that in general, public accounting audit experience would give a candidate experience in training staff accountants. Public accounting experience would give you experience in analyzing financials:

Public accounting experience would give you experience in meeting reporting deadlines. Public accounting experience would give you experience in project work, that would require creative analytical and critical thinking skills. Public accounting experience would give you skill sets in researching and resolving discrepancies and inquiries.

Public accounting skills would give you experience in communicating with various departments in the companies that you audit including the operational divisions, consolidations, tax, treasury and internal audit. Public accounting experience would give you experience with preparation of financial analysis for the financials you're auditing. (Morgan Dep. 76:20–77:14.)

Supervisor Ronda Bush similarly testified that public accounting audit experience is helpful in "[t]he SEC reporting, performing the audits of publicly held companies or even the non-for profits dealing with acquisitions, dealing with divestitures. Again, the analytical experience, the interaction with the clients, consolidations." (Bush Dep. 26:5-10.)

Supervisor Laurie Ford also testified that public accounting audit experience "prepares an individual to have a skill set in which they have worked on a variety of SEC reporting problems, a variety of SEC reporting clients, different types of transactions. It prepares someone by providing them with the skill set of analytical skills that are much needed in any type of corporate accounting position." (Ford Dep. 33:3-10.)

Likewise, Shackelford testified that her prior public accounting audit experience helped her in her role as supervisor

the supervisor performed no auditing duties and the Memphis office did not report directly to the SEC.[7] Plaintiff has offered no evidence to show that Defendant was in any way unreasonable to consider public accounting audit experience relevant in these ways. Therefore, Plaintiff cannot meet her burden of showing pretext by arguing that such experience is irrelevant.

**b. Plaintiff's Experience**

Plaintiff also argues that Defendant's proffered reason for its promotion decision was a pretext because she had more tenure, had more leadership experience, and had been an accountant longer than

---

because she was "able to adjust to working with different people and different . . . personalities." (Shackelford Dep. 57:24-58:1.) She added that I was exposed to public companies where I helped prepare information for reporting to the SEC. I was on nonpublic companies where we had to prepare financial statements — full financial statements, including notes which furthered my background and foundation so that I could move into a position such as a supervisor position. (Shackelford Dep. 58:2-9.)

[7] Plaintiff's heavy reliance on the fact that Defendant's Memphis office does not directly report financial statements to the SEC, though technically correct, is unpersuasive. The Memphis office provided the "building block work" that feeds into the consolidated financials that are reported to the SEC by Defendant's New York office. (See Morgan Dep. 75:21–76:2 ("[T]he work that is done here is compiled with other work done in other Pfizer entities globally to produce a consolidated financial statement which is published to the SEC.").) In light of this arrangement, Plaintiff's contention that Defendant's preference for prior public accounting audit experience is a pretext because the Memphis office does not directly report to the SEC is misleading.

Shackelford. Employers are "generally free to choose among qualified candidates," Wrenn v. Gould, 808 F.2d 492, 502 (6th Cir. 1987), and "[t]he law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with." Hartsel, 87 F.3d at 801. The Sixth Circuit has held that

> Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment. . . . On the other hand, in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former.

Bender v. Hecht's Dep't Stores, 455 F.3d 612, 626-27 (6th Cir. 2006).

Here, Plaintiff has offered no probative evidence of discrimination. Plaintiff makes no showing that the criteria for the supervisor position were not applied

to all candidates.[8] Nor does Plaintiff provide any evidence to support her contention that Defendant hired African-American employees without public accounting experience and Caucasian employees with such experience in an effort to limit promotional opportunities for the African-American employees. In the absence of such evidence, Plaintiff must show that her qualifications were significantly better than Shackelford's so that no reasonable employer would have chosen Shackelford over Plaintiff.

Plaintiff cannot make this showing. Morgan testified that unlike Plaintiff, Shackelford had public accounting experience, experience with public clients, experience in the department's "rollout of web forms," and experience acting as a supervisor. (Morgan Dep. 117:20-118:2.) Moreover, Plaintiff herself admitted that Shackelford was qualified for the supervisor position and that she would have selected Shackelford for the second round of interviews. (Ross Dep. 145:14-18, 170:12–172:8.)

Plaintiff has no probative evidence of discrimination nor does she have evidence that she was significantly more qualified for the supervisor position than Shackelford. Therefore, Plaintiff cannot show that she was more qualified than Shackelford to support her claim that Defendant's proffered reason was a pretext. As a result, Defendant's motion as to

---

[8] Indeed, one of the candidates for the available position, Donna Kook, had more tenure with Defendant than the other candidates, had been an accountant longer than the other candidates, and was already working as a supervisor in a different area of the CA&A Department. (Morgan Dep. 20:2-21, 59:11-17, 115:3-116.) Kook, who is Caucasian, did not make the second round of interviews. (Ross Dep. 103:17–104:6, 139:5-19.)

Plaintiff's employment discrimination claim is GRANTED.

### B. Constructive Discharge

Defendant next contends that it is entitled to summary judgment on Plaintiff's constructive discharge claim. To succeed on this claim, Plaintiff must show that (1) Defendant "deliberately create[d] intolerable working conditions, as perceived by a reasonable person" and (2) Defendant did so "with the intention of forcing the employee to quit." Logan v. Denny's, Inc., 259 F.3d 558, 568-69 (6th Cir. 2001) (quoting Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999)). Factors courts consider in analyzing whether a defendant deliberately created intolerable working conditions include demotion; reduction in salary; reduction in job responsibilities; reassignment to menial or degrading work; reassignment to work under a younger supervisor; badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or offers of early retirement or continued employment on terms less favorable than the employee's former status. Id. at 569 (citing Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000)).

an attitude that made it difficult for Plaintiff to stay and made Plaintiff feel like she was effectively terminated. Nonetheless, Plaintiff also testified that Ford ostracized a male Caucasian employee. (Id. at 133:25- Here, Plaintiff states that she felt ostracized in the wake of Defendant's decision not to hire her because she had less communication with her co-

workers.[9] This assertion not only is insufficient to establish that Defendant deliberately created intolerable working conditions, but it is also contradicted by Plaintiff's own testimony. Plaintiff admitted that Morgan met with her following the decision to promote Shackelford to give her feedback on the interview process. (Ross Dep. 225:3-12.) Plaintiff further stated that she also met with Dan Brown, Director of Human Resources, who told her about other career opportunities with Defendant and that Plaintiff's manager Tim Reynolds "consistently spoke highly" of Plaintiff. (Id. at 221:24-222:2; 285:1-5.) Moreover, Brown told Plaintiff that she was considered to be a "top talent" for Defendant and gave Plaintiff his cell phone number so Plaintiff would be able to reach him while he was on vacation. (Id. at 306:6-9; 309:3-17.) Thus, Plaintiff's own testimony demonstrates that far from being ostracized, she received significant communication following the promotion decision.

Plaintiff identifies Supervisor Laurie Ford as exhibiting 135:1.) Plaintiff therefore cannot show that Ford's conduct was tied to any effort by Defendant to make working conditions intolerable specifically for Plaintiff. Accordingly, Defendant's motion as to Plaintiff's constructive discharge claim is GRANTED.

**C. Emotional Distress**

---

[9] Plaintiff stated in her deposition that following Shackelford's promotion, Plaintiff could not "recall any real conversation or any really major conversations, work-related or personal." (Ross Dep. 149:2–150:17.)

Because the Court dismisses Plaintiff's claims for failure to promote and constructive discharge, Plaintiff is not entitled to recover any damages. Thus, Defendant's motion as to Plaintiff's claim for emotional distress is likewise GRANTED.

**D. Attorneys' Fees**

Defendant seeks attorneys' fees, arguing that plaintiff provided no evidence to support her theories of pretext or her claim that she was constructively discharged. Prevailing defendants are entitled to costs and attorneys' fees when a plaintiff's claim is "frivolous, unreasonable, or groundless, or the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). Here, although Plaintiff's claims lacked factual support, it is not clear Plaintiff continued to litigate after this fact became clearly apparent. Rather, when she responded to Defendant's motion, Plaintiff was still hoping to obtain more information in support of her claim in discovery. (See Pl.'s Resp. to Def.'s Mot. for Summ. J. 9-10.) Plaintiff's request for further discovery has since been denied by the Court, (see Order Den.Pl.'s Appeal and/or Objections of the Magistrate's Order Den.Pl.'s Mot. for an Order Compelling Disc. (D.E. 64)), but the Court cannot say that at this earlier stage of litigation Plaintiff's claim was clearly frivolous or unreasonable. Therefore, Defendant's request for attorneys' fees is DENIED.

## IV. CONCLUSION

For the reasons discussed, the Court GRANTS Defendant's Motion for Summary Judgment. Defendant's request for attorneys' fees is DENIED.

SO ORDERED this 30th day of March, 2009.

s/ JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

1 of 3 DOCUMENTS

**MICHELLE ROSS, Plaintiff-Appellant, v. PFIZER, INC., Defendant-Appellee.**

No. 09-5526

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

*10a0184n.06; 2010 U.S. App. LEXIS 6113; 2010 FED App. 0184N (6th Cir.); 108 Fair Empl. Prac. Cas. (BNA) 1530*

**March 23, 2010, Filed PRIOR HISTORY:** [*1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

**COUNSEL:** For MICHELLE ROSS, Plaintiff - Appellant: James Edward King, Jr., Eskins King, Memphis, TN.

For PFIZER, INC., Defendant - Appellee: David L. Gordon, Melissa Lynn Kotun, Jackson Lewis, Atlanta, GA.

**JUDGES:** BEFORE: MARTIN, ROGERS, and McKEAGUE, Circuit Judges.

**OPINION BY:** BOYCE F. MARTIN, JR.

**OPINION**

BOYCE F. MARTIN, JR., Circuit Judge. Michelle Ross, an African-American former employee in Pfizer Inc.'s Corporate Accounting and Analysis Department in Memphis, Tennessee, sued Pfizer for racial discrimination when it promoted a Caucasian employee to a supervisory position instead of Ross. She also claimed constructive discharge, essentially alleging that Pfizer's failure to promote her and the resulting workplace environment left her no choice but to leave her job for a new, comparably paying job. Finally, she sought compensation for emotional distress. The district court granted summary judgment for Pfizer on all claims, and Ross appeals. We **AFFIRM.**

I.

Ross began working in Pfizer's Corporate Accounting and Analysis Department as a staff accountant in 2000, and she was promoted to senior staff accountant in 2005. The Department was responsible [*2] for compiling financial and accounting information for Pfizer and forwarding it to the New York office, which handled all public SEC filings. The Department itself was not responsible for any public filings.

The Department was comprised of four divisions; Ross worked in the employee benefits accounting division. Each division had its own supervisor, and each supervisor managed a team of staff and senior staff accountants. At some point in 2005, Monica Morgan became the manager of the entire Department. Thus, the chain of command as of 2005 was that Ross, a senior staff accountant, reported to the supervisor of the benefits division, who in turn reported to Morgan.

In May 2006, one of the supervisors was promoted, so Pfizer posted an advertisement for the open supervisor position. The posting for the position listed as preferred qualifications, among other things, "three-plus years of big 4 public accounting (audit)" experience and "previous supervisory experience." Morgan was responsible for drafting the job posting. She testified that she thought that "big 4 firm" experience, meaning work in the audit division of PricewaterhouseCoopers, Deloitte Touche Tohmatsu, Ernst & Young, or KPMG, [*3] was important because it gave an individual exposure to the overall balance sheet of large public companies like Pfizer and because a broad exposure to balance sheet accounting would be useful background for the person filling the open supervisor position.

Ross submitted her resume for the position. She had prior supervisory experience as she had been an interim supervisor for a period of months. However, she did not have experience with a big 4 accounting firm. Ross was chosen for an initial interview, along with four other candidates. At least one of the other candidates, Angela French, was an African-American female with big 4 accounting experience, though hers was not audit experience.

The initial interviews were conducted by Morgan and three of the division supervisors. Ross asserts that at some point during the interview, Morgan said "two people would go on to the second round, and that she was not going to let this monkey be on her back." Ross asserts that she took the "monkey" reference to be directed at her as an African-American, derived from the "porch monkey" racial slur. Morgan, however, testified that she was using "monkey" in the sense of the common phrase "get this monkey [*4] off my back" in reference to a difficult project that she and Ross were working on, signifying that she was putting that project aside to focus on Ross's interview.

After the first round of interviews, the three supervisors provided Morgan with their recommendations on which two candidates should make it to the next round. Based on this input and her own opinions, Morgan selected two Caucasian women with prior big 4 audit experience to go on to the next round. Morgan eventually chose Amy Shackleford for the supervisor position.

Ross was informed that she did not make it to the second round of interviews on May 25, 2006. That same day, Ross contacted headhunters to begin searching for a new job. Soon after, Morgan became aware that Ross was disappointed at not having been selected. She met with Ross several times to give feedback on the interview and to discuss how Ross could position herself for the next open position, including giving Ross more leadership opportunities. Pfizer's Human Resource Director, Dan Brown, also met with Ross. They discussed ways for Ross to get more exposure to auditing and other developmental

opportunities, including attending leadership conferences at Pfizer's [*5] expense.

Nevertheless, Ross left Pfizer in July 2006 to take a position at a comparable salary with another large company. In May of 2007, she filed suit alleging claims under Title VII and *42 U.S.C. § 1981* for failure to promote due to racial discrimination, as well as a claim of constructive discharge. During discovery, a dispute arose regarding Ross's request for documents and information regarding Pfizer's promotion of one of the supervisors to a position in the New York office. A central aspect of Ross's attack on Pfizer's decision not to promote her is the big 4 public audit experience preference, which she claims was unnecessary for a supervisor in the Memphis-based Department and was thus a pretext for a decision not to promote based on her race. Apparently, Pfizer had in 2008 promoted one of the Memphis supervisors, a Caucasian male without public accounting experience, to the New York office, which does engage in public filings and reporting. She claimed that information regarding this promotion was relevant to show that the preference for big 4 accounting experience for a supervisor position in Memphis was unreasonable if Pfizer did not consider such experience necessary [*6] for promotion to a position that actually handled public reporting. Pfizer objected to this line of discovery, and the magistrate judge denied Ross's motion to compel production of this evidence. The district court affirmed the magistrate judge's decision.

The court eventually granted summary judgment to Pfizer on all claims, finding that Ross had failed to present sufficient evidence to create a question of fact as to whether Pfizer's proffered reason for not

promoting Ross was a pretext and that Ross had not established evidence to support her claim for constructive discharge. Ross timely appealed.

II.

On appeal, Ross takes issue with the court's grant of summary judgment on her failure to promote and constructive discharge claims, as well as with the discovery ruling. We review the district court's summary judgment decision de novo. *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco, Inc.*, *477 F.3d 854, 861 (6th Cir. 2007)*. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*. [*7] The "mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

III.

Both Title VII and *section 1981* prohibit intentional discrimination in the workplace on the basis of race, *42 U.S.C. § 2000e-2(a)(1)* (Title VII); *Noble v. Brinker Int'l, Inc., 391 F.3d 715, 720 (6th Cir. 2004)* (*section 1981*), and both are analyzed under the same framework. *Newman v. Fed. Express Corp., 266 F.3d 401, 406 (6th Cir. 2001)*. To show employment discrimination, the plaintiff must present either direct evidence of discrimination or

circumstantial evidence that would allow an inference of discriminatory intent. *Anthony v. BTR Auto. Sealing Sys., Inc., 339 F.3d 506, 514 (6th Cir. 2003).*

Direct evidence "is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999).* Direct evidence "proves the existence of a fact without requiring any inference." [*8] *Grizzell v. City of Columbus, 461 F.3d 711, 719 (6th Cir. 2006).*

A case relying on circumstantial evidence, however, is analyzed under the familiar *McDonnell Douglas* three-step, burden-shifting framework. *Chen v. Dow Chem. Co., 580 F.3d 394, 400 (6th Cir. 2009).* For purposes of appeal, Pfizer assumes that Ross has established a prima facie case of racial discrimination. And Ross does not dispute that Pfizer has met its burden of proffering a legitimate, nondiscriminatory explanation for its decision not to promote her. Thus, the parties agree that the burden is on Ross to show that Pfizer's explanation is a pretext for intentional discrimination.

Plaintiffs establish pretext by showing "that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action." *White v. Baxter Healthcare Corp., 533 F.3d 381, 393 (6th Cir. 2008).* "[T]o survive summary judgment a plaintiff need only produce enough evidence to support a prima facie case and to rebut, but not to disprove, the

defendant's proffered rationale," so, once the employer has proffered a non-discriminatory explanation [*9] for its action, the plaintiff "d[oes] not need to produce additional evidence to support a finding of pretext; the evidence that he produce[s] in support of his prima facie case may, but will not necessarily, suffice to show a genuine issue of material fact concerning pretext." *Blair v. Henry Filters, Inc., 505 F.3d 517, 532, 533 (6th Cir. 2007).* If, as in this case, the plaintiff seeks to compare her qualifications to those of the person chosen for the position, relative qualifications may establish a triable issue of fact as to pretext if the evidence shows that either (1) the plaintiff's qualifications "were so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former," or (2) the plaintiff was "as qualified as or better qualified than the successful applicant" and the record also contains "other probative evidence of discrimination." *Bender v. Hecht's Dep't Stores, 455 F.3d 612, 626-27 (6th Cir. 2006).*

**A. Direct Evidence of Discrimination**

Ross contends that the "monkey" reference is direct evidence of racial discrimination, arguing that "monkey" is a commonly known racial epithet referring [*10] to African Americans. Pfizer counters that Morgan used the word "monkey" as part of the common phrase "monkey on your back" or "get this monkey off my back." The district court agreed with Pfizer, finding that "monkey" was not direct evidence of discrimination.

Other courts have held that the word "monkey," when used in the context of the monkey-on-the-back

idiom, is not direct evidence of racial discrimination. *Gregory v. Widnall, 153 F.3d 1071, 1074-75 (9th Cir. 1998); Bell v. Waste Mgmt., Inc., No 03-cv-992, 2004 U.S. Dist. LEXIS 21864, at *17 n.2 (D. Del. Oct. 29, 2004).* We agree--though it is possible that someone referring to a monkey on her back could be doing so with racial animus, the monkey-on-the-back idiom is commonly used in everyday conversation in situations without racial undertones. As "monkey" in this context is subject to two different interpretations, it does not necessarily "require the conclusion" that the speaker is making a racial slur. *Jacklyn, 176 F.3d at 926.* Thus, it is not direct evidence of racial discrimination.

However, we acknowledge that the word "monkey" can have a racial connotation and thus, when combined with other evidence, could lead one to conclude [*11] that the speaker was motivated by racial animus. As Ross points out, the facts surrounding Morgan's explanation of her usage of the term could cast doubt on the sincerity of her explanation. She first denied having ever made the statement when confronted by Dan Brown, the Human Resources Director. Then, in Pfizer's position statement to the EEOC, Brown wrote that Morgan's statement alluded to the interview process. But, in her deposition, Morgan claims that she made the statement in regard to a work project completely unrelated to the interviews. A juror could see these contradictory explanations as evidence that Morgan and Pfizer were less than honest about the true reason for her statement. Thus, use of the word "monkey" could add some weight as indirect evidence of discrimination.

**B. Has Ross Created a Question of Fact as to Whether Pfizer's Explanation for its Action is Pretext?**

Because Ross has not shown direct evidence of discrimination, she must show circumstantial evidence sufficient to create a question of fact as to whether Pfizer's proffered explanation for its decision not to promote her is a pretext for a discriminatory motive. Pfizer's explanation was that the candidate [*12] selected for the position, Shackleford, had the prior supervisory experience and the big 4 audit experience that the job posting had indicated were preferred, whereas Ross did not have the big 4 experience. As stated above, Ross may show that this explanation is a pretext by showing "that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action." *White, 533 F.3d at 393.* Ross contends that she can prove pretext under any of the three prongs, but this is not the case. It is undisputed that Shackleford had big 4 experience and that Ross did not, so Pfizer's proffered explanation has basis in fact. Similarly, Ross has not presented any evidence that her lack of big 4 audit experience "was not the actual reason" for her failure to get the promotion--she has found no emails or other evidence that would contradict Pfizer's assertion of the reason for its decision.

Thus, Ross must rely on the third avenue of showing pretext, that the proffered explanation is insufficient to explain the employer's actions. The main thrust of her argument is that Pfizer's desire for a [*13] candidate with big 4 audit experience was not a reasonable preference for the open supervisor

position. She maintains that, because the Department did not engage in public filing or reporting, big 4 public auditing experience was not relevant to the supervisor position and, thus, Pfizer's decision to promote Shackleford was not a "reasonable business judgment." She seizes on the statement in *White* that:

> In determining whether the plaintiff has produced enough evidence to cast doubt upon the employer's explanation for its decision, we cannot . . . unquestionably accept the employer's own self-serving claim that the decision resulted from an exercise of "reasonable business judgment." . . . Nor can we decide "as a matter of law" that "an employer's proffered justification is reasonable." . . . The question of whether the employer's judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider. Our role is merely to assess whether the plaintiff has presented enough evidence for a reasonable jury to accept the plaintiff's claim that the employer made an unlawful business decision.

*Id. at 393 n.6* (emphasis in original).

Ross would have us read this [*14] statement as a categorical rule that, whenever a plaintiff challenges the reasoning behind an employer's decision, the jury must determine whether the employer's decision was reasonable. However, such a reading would eliminate the gatekeeping function of

summary judgment that allows claims to go to the jury only if a reasonable jury could find for the plaintiff based on the evidence in the record. Furthermore, Ross takes the statement in *White* out of context. The *White* majority was responding to the dissent's argument that courts should apply what would be essentially a categorical "business judgment rule" that would prevent courts from looking behind an employer's stated hiring preferences to determine if it is a pretext. In its footnote six, the majority rejected the dissent's argument by showing that the reasonableness of the employer's reasoning is a jury question if there are conflicting facts. However, the rule remains that a "plaintiff may also demonstrate pretext by offering evidence which challenges the reasonableness of the employer's decision *'to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual* [*15] *motivation.'" Id. at 393* (emphasis added) (quoting *Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 578 (6th Cir. 2003)* (en banc)). Thus, a plaintiff may attack the reasonableness of an employer's qualification preferences only insofar as an unreasonable business justification could be a sign of pretext for illegal discrimination. *See id.* ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose as a pretext, if indeed it is one.") (quoting *Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)).*

When viewed in the correct light, Ross's attack on the reasoning behind Morgan's preference for someone with big 4 accounting experience is

unpersuasive, both as a matter of logic and as a matter of evidence in the record. Ross has produced nothing more than her own argument that the desire for big 4 audit experience is an unreasonable criterion for the promotion. Pfizer is a publicly traded, Fortune 500 company, and the Corporate Accounting and Analysis Department is responsible for preparing the building blocks with which the New York office [*16] prepares the company's public filings. We do not find it at all "idiosyncratic" that Morgan would want someone with exposure to that process as one of her lieutenants. [1] To say otherwise would be to create a rule that an employer may not prefer highly qualified applicants and, instead, must accept anyone who possesses the bare-minimum qualifications for the job. We are aware of no such rule, nor would it be the place of the courts to fashion one. Accordingly, Ross has produced no evidence by which a reasonable juror could find that the stated preference for someone with big 4 audit experience is so utterly unreasonable that it is evidence of pretext.

1 It is on this point that Ross brings her challenge to the district court's discovery ruling. As stated above, she argues that if big 4 experience was irrelevant to a position in the New York office, it was certainly not relevant to a position in the Memphis office. She thus sought information regarding the New York job. Her argument ignores the difference in decision-makers. It is undisputed that Morgan was solely responsible for drafting the job posting in Memphis, which included the preference for big 4 experience, and for the ultimate [*17] decision on who to promote. However, Morgan had nothing to do with

> advertising or filling the New York position. Thus, the circumstances of the New York position have nothing to do with the relevant question here, which is whether Morgan, acting on behalf of Pfizer, unlawfully discriminated against Ross due to her race. The district court's denial of Ross's motion to compel this information was well within its discretion.

Once Ross's attack on the preference for big 4 experience fails, she has little else with which to attack Pfizer's failure to promote her. If Morgan was reasonable in preferring candidates with big 4 audit experience, and Shackleford had that experience whereas Ross did not, then it is difficult to see how Ross could show pretext. All she is left with is the argument that she was nevertheless more qualified for the position than Shackleford. However, our comparison of the two candidates' respective qualifications, in conjunction with the rest of the record, convinces us that no reasonable jury could find that Ross's qualifications "were so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant [*18] over the former." *Bender, 455 F.3d at 627-28.* And even if reasonable minds could differ over whether Ross was "as qualified as or better qualified than" Shackleford, there is not sufficient "other probative evidence of discrimination" in the record from which a reasonable jury could conclude that Morgan's decision was animated by Ross's race. We therefore affirm the district court's entry of summary judgment for Pfizer on the employment discrimination claims.

**C. Constructive Discharge Claim**

Ross claims that her experience during her interview, including the "monkey" comment, and her work environment following the interview left her no choice but to leave Pfizer. Specifically, she contends that, after she was not chosen for a second interview, Morgan and others began to "ostracize" her, stopped communicating with her, began to exclude her from meetings, and were generally short with her. She claims that this treatment was so unbearable that she felt compelled to leave. She brought a constructive discharge claim, but the district court found insufficient evidence to support the claim and thus granted summary judgment for Pfizer.

As we stated in *Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004)*,

> A [*19] constructive discharge requires a determination that "'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" [*Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)*] (quoting *Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65 (5th Cir. 1980)*). *See also Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 539 (6th Cir. 2002)* (conditions supporting a constructive discharge "must be objectively intolerable to a reasonable person") (citations omitted).

*Id. at 533-34.* In determining whether a work environment rises to the level of compelling an

employee to leave, this Court has adopted the following inquiry:

> Whether a reasonable person would feel compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued [*20] employment on terms less favorable than the employee's former status.

*Logan v. Denny's, Inc., 259 F.3d 558, 569 (6th Cir. 2001)* (quoting *Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000)).*

Ross contends that her working environment was such that no reasonable person would have stayed. But, the facts point the other way. Ross admitted in her deposition that both Morgan and Brown met with her after the promotion decision had been made to discuss her continued employment with Pfizer and ways to position her better for future promotions. Thus, it cannot be said that there was any overt or covert intent on the part of Pfizer to force Ross out. Moreover, Ross began searching for a new job the day that she learned that she had not been selected for a second interview. If she was planning to leave on the day that she found out about not being

selected for a second interview, the state of the workplace environment after that date could not be what compelled her to leave. Accordingly, we affirm the entry of summary judgment for Pfizer on the constructive discharge claim, as well as her demand for damages arising from emotional distress.

IV.

For the reasons set forth above, we **AFFIRM**.